

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. 5:08-cv-396-FL

AMERICAN PETROLEUM INSTITUTE, and
NATIONAL PETROCHEMICAL AND
REFINERS ASSOCIATION,

Plaintiffs,

v.

ROY COOPER, ATTORNEY GENERAL OF
THE STATE OF NORTH CAROLINA,

Defendant,

and

NORTH CAROLINA PETROLEUM AND
CONVENIENCE MARKETERS
ASSOCIATION,

Intervenor-Defendant.

**SUPPLEMENTAL JOINT REPORT
AND PLAN CONCERNING CASE
SCHEDULE**

Plaintiffs American Petroleum Institute and National Petroleum and Refiners Association (“Plaintiffs”), Defendant Roy Cooper, Attorney General of the State of North Carolina, and Intervenor-Defendant North Carolina Petroleum and Convenience Marketers Association (“NCPCMA,” the latter two sometimes collectively referred to herein as “Defendants”), by and through their undersigned counsel, respectfully submit this Supplemental Joint Report and Plan pursuant to the Court’s Order of March 16, 2009, adopting the parties’ Joint Report and Plan (“Scheduling Order”).

In compliance with the Court’s Scheduling Order, a teleconference of counsel for all parties was held on June 11, 2010, and was attended by:

Pressly M. Millen of the firm of Womble Carlyle Sandridge & Rice, PLLC and Thomas L. Cubbage III of the firm of Covington & Burling, LLP for Plaintiffs; and

Mark A. Davis of the North Carolina Department of Justice for Defendant Cooper; and Harold W. Berry, Jr. of the firm of Hatch Little & Bunn, L.L.P. and Charles F. Marshall, III of the firm of Brooks, Pierce, McLendon, Humphrey & Leonard LLP for Defendant-Intervenor NCPCMA.

During the teleconference, the parties discussed (1) issues relating to Defendants' discovery of Plaintiffs' trial evidence, which will involve written discovery and depositions of various third parties; and (2) a schedule for the remaining discovery and potential pre-trial proceedings.

As a result of the parties' meeting, and in compliance with Paragraph 2 of the Court's Scheduling Order, counsel for the parties report the following information required by the Scheduling Order:

- a. The parties' agreed list of claims/issues remaining for trial:

The parties agree that Plaintiffs' claims remaining for trial are:

- (1) Whether in its application, the Ethanol Blending Statute is preempted by the Energy Policy Act of 2005 and the Energy Independence Act of 2007 (and the U.S. EPA regulations implementing them) because it stands as an obstacle to the accomplishment of federal objectives;

- (2) Whether, in its application to sales to branded gasoline products, the Ethanol Blending Statute is preempted by Lanham Act, because it hinders federal rights and stands as an obstacle to the accomplishment of federal objective;

- (3) Whether, in its application to sales of branded gasoline products through franchise relationships, the Ethanol Blending Statute is preempted by the Petroleum Marketing Practices Act, because it hinders federal rights and stands as an obstacle to the accomplishment of federal objectives;

(4) Whether, in its application, the Ethanol Blending Statute, violates the dormant Commerce Clause.

Each party expects that it will develop specific factual arguments, issues, and/or defenses through discovery to support its position on Plaintiffs' remaining claims.

- b. Any party's list of potential claims/issues remaining for trial as to which there is no agreement: None.
- c. A date (expected to allow a period of between 90-180 days) by which Defendants will complete their discovery regarding Plaintiffs' trial evidence: Defendants will complete their discovery regarding Plaintiffs' trial evidence within 150 days from the date of the entry of the Court's order relating to this supplemental report.
- d. A date (within the period described in ¶ c., *supra*) by which Counsel for Defendants will provide Counsel for Plaintiffs with Defendants' proposed trial evidence: Defendants will provide counsel for Plaintiffs with Defendants' proposed trial evidence within 180 days from the date of the entry of the Court's order relating to this supplemental report.
- e. A date (expected to allow a period of no more than 60 days after the deadline established in ¶ c., *supra*) by which Plaintiffs will complete their discovery regarding Defendants' trial evidence: Plaintiffs will complete their discovery regarding Defendants' trial evidence within 60 days after the date they receive Defendants' trial evidence.

- f. The parties' agreement (or the parties' positions if no agreement can be reached) concerning whether any further summary judgment motion practice is warranted: The parties presently are not in agreement concerning whether any further summary judgment motion practice is warranted, but the parties agree that any such motion shall be filed within 90 days after Plaintiffs' have completed their discovery of Defendants' trial evidence.
- g. A request that, in the event any issues remain for trial, a trial (which should take no longer than three trial days) be set no earlier than 60 days after the Court has ruled on the parties' motions for summary judgment: The parties respectfully request that any trial should be set no earlier than 60 days after the Court has ruled on the parties' motion for summary judgment.

In undertaking the above-referenced discovery schedule, the parties are continuing to work together in an amicable fashion to promote the quick and efficient resolution of this matter, including, to the degree possible, agreement regarding stipulated facts which may be presented to the Court in connection with any trial.

Respectfully submitted this 15th day of June, 2010.

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